United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

74-2561 12-24-74

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

74-2501

ELIAN BOLAÑOS,

Plaintiff-Appellant

-v-

MAURICE F. KILEY, District Dircetor, Immigration and Naturalization Serivce, New York District,

Defendant-Appellee.

BRIEF FOR APPELLANT

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No. 74-2561

ELIAN BOLAÑOS

Plaintiff-Appellant

-v-

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Defendant-Appellee.

Appeal from the United States District Court For The Eastern District of New York

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BRIEF FOR APPELLANT

PRELIMINARY STATEMENT

This is an appeal from an unreported decision by Chief Judge Mishler dismissing the complaint and denying plaintiff's request for an injunction requiring the Immigration and Naturalization Service to stay the appellant's deportation pending the determination of certain civil litigation involving appellant which has been commenced and is in its pre-trial stages.

ISSUES PRESENTED FOR REVIEW

1. Does the Immigration and Naturalization Service have the discretionary power to refuse to stay appellant's deporation when such deportation will violate plaintiff's Constitutionally protected right to maintain civil actions?

2. If, indeed, the Immigration and Naturalization Service does have such discretionary power, did it abuse such power in refusing to grant a stay of the deportation of plaintiff while he has pending civil actions arising out of a false arrest and imprisonment?

STATEMENT OF THE CASE

Appellant Bolaños, a native and citizen of Colombia, lawfully entered the United States on a visitor's visa on July 22, 1973. This visa was valid until August 12, 1973 and was not renewed, His ultimate deportability is therefore conceded and is not at issue.

On March 6, 1974, Bolaños was arrested by members of the New York City Police Department on the complaint of one William Richardson and as a result Bolaños was charged with three (3) counts of Robbery in the First Degree, Assault in the Second Degree and Possession of Weapons as a Felony. Unable to make bail of $15,000.00, he was detained from the date of his arrest until April 16, 1974, a total of forty-one (41) days.

On April 16, 1974, the Grand Jury sitting in Queens County refused to indict and all charges against Bolaños were dismissed (28a) following testimony of Bolaños, a co-worker, and his employer which conclusively showed that Mr. Bolaños was either at work or on his way home from work at the time of the alleged crimes and could not

therefore not have possibly committed them.

However, as a result of this arrest, Bolaños was brought to the attention of the Immigration and Naturalization Service which issued a detainer warrant for him based on his having overstayed his visa. On April 18, 1974 a hearing was held before a special inquiry officer of the Immigration and Naturalization Service and it was ordered that Bolaños be deported pursuant to sections 241 (a) (2) and 241 (a) (9) of the Immigration and Naturalization Act of 1952, 8 U.S.C. , sections 1251 (a) (2) and (a) (9), but he was granted the privilege of voluntary departure in lieu of deportation through May 18, 1974, and he was released on $500.00 bond. No appeal of this order was made.

Bolaños, however, did not depart prior to the required date and in October of 1974, following receipt of a letter from the Immigration Service directing him to report for deportation or face foreiture of the bond, Bolaños sought the adivse of present counsel. A formal request was then made to the Immigration Service asking for a Stay of deportation to allow time for counsel to prepare and pursue the civil remedies they felt Bolaños was entitled to as a result of his arrest in March. This request was denied. However voluntary departure status was restored upon presentation of a validated airlines ticket for November 7, 1974.

As this denial of a stay is not appealable administratively, 8C.F.R. 243.4, the action herein was commenced in the United States District Court for the Eastern District of New York on November 6, 1974, simultaneiously with an action pursuant to 42 U.S.C. 1983 against Michael

Codd as Commissioner of the Police Department (51a), Civil Action No. 74 C 1578, arising out of the circumstances of Bolaños arrest and detention.

At the informal request of the Court below the Immigration and Naturalization Service extended the period for voluntary departure status pending the decision of the Court. That decision, adverse to Bolaños, was rendered on November 15, 1974 and filed on November 18, 1974. Since then, Bolaños has been permitted to stay without forfeiting his bond by decision of this Court on motion and oral argument by appellant on December 10, 1974 pending the outcome of this appeal.

Although not commenced prior to, or simultaneious with the action herein, a civil action for false arrest against the complain--ant William Richardson, has been commenced in the New York State Supreme Court, Queens County. The delay was necessitated by the fact that the minutes of the preliminary hearing in the criminal action were unavailable at that time and there was no other feasible way to obtain the information needed. That complaint has been included in the Appendix (53a) for the Court's convenience.

POINT I

STATUTORY AND DECISIONAL LAW CLEARLY SUPPORT APPELLANT'S POSITION

A. Aliens Residing Within the United States, Whether Legal or "Illegal", Have the Same Rights to Maintain Civil Actions as Citizens

Section 1981 of the Civil Rights Act states:

> "All Persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, to be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other." (emphasis added)
> 42 U.S.C. 1981

Section 1981, and its literal predecessors, derive from the Civil Rights Act of 1866 and have variously been held to have derived their consitutional foundation from the 14th Amendment, Hodges v. United States 203 U.S. 1(1906), and thus requiring state action, or from the 13th Amendment, Civil Rights Cases, 109 U.S. 3(1883), Clyatt v. United States, 197 U.S. 207 (1905), Jones v. Alfred H. Mayer Co. 392 U.S. 409 (1968), Guerra v. Manchester Terminal Corp. 350 F. Supp. 529 (S.D. Tex. 1972), thereby extending section 1981 rights to individual actions as well as state. (1)

Although originally designed to protect the rights of the newly-freed slaves, Section 1981 has long been held to apply to other classes as well, including aliens, Takahashi v. Fish and Game Commission 334 U.S. 410, Yick Wo v. Hopkins, 118 U.S. 369, United States v. Wong Kim Ork

1) See discussion of Guerra in Vanderbilt Journal of Transnational Law 6:660-8, Spring '73.

169 U.S. 649, Martinez v. Fox Alley Bus Lines Inc. 17 F. Supp. 576 (N.D. Ill. 1936) Woo Sung Ling v. City of New York 276 App. Div. 1026 (1950), Commercial Standard Fire and Marine Co. v. Galindo, 484 SW2d 635 (Ct. of Civil Appeals of Texas, El Paso, 1972)

None of these just-cited cases differentialted between the rights of "illegal" or "legal" aliens, and, in fact, in Commerical Standard (at 636), the alien therein involved had been deported no less than eight times prior to the action therein involved.

In Martinez the court eloquently reasoned as follows:

> The position of the defendant is that if an alien, citizen of a friendly country, is unlawfully in the United States he may be despoiled of his property, contracts with him may be breached, that he may be unlaw--fully assaulted and injured, and that he is without redress, execpt as the authorities may choose to prosecute criminally any one who, in his dealing with the alien, has violated some criminal law. I cannot agree with this contention.
>
> It is within the exlusive jurisdiction of Congress to determine what aliens may enter this country and their rights and disabilities while here. Congress has legislated on these subjects but at no time has it declared that any alien, either lawfully or unlawfully within this country, shall be debarred from access to the courts. On the contrary, it has expressly provided (Civil Rights Act, U.S.C. title 8 41 (8 U.S.C.A. 41) that all persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, sue and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens***
>
> One injured as a result of the engligence of another has a right of action against that other to recover damages sustained by reason of such injury. That right of action is

> property. Kent's Commentaries (Comstock Ed.2) 473; Chicago, B. & Q. R.R. Co. v. Dunn, 52 Ill. 260, 264, 4 Am. Rep. 606. It is the general rule that aliens, other then enemy aliens, who are sui juries and who are not incapacitated by the laws of the place where the action is brought, may maintain suits in the proper courts to vindicate their rights and redress their wrongs. Taylor v. Carpenter (C.C. Mass.) 23 Fed. Cas. No. 13,785, p. 744, Janusis v. Long, 284 Mass. 403, 188 N. E. 228, Silosberg v. N.Y. Life Ins. Co., 244 N.Y. 482, 155 N.E. 749, Lew You Ying v. Kay, 174 Wash. 83, 24 P.(2d) 596.
>
> While an alien is permitted by the government of the United States to remain in the country, he is entitled to the protection of the laws in regard to his rights of person and property. Fong Yue Ting v. United States, 149 U.S. 698, 724, 13 S.Ct. 1016, 37 L.Ed. 905.
>
> Congress, had it see fit so to do, might have provided that an lien making an illegal entry into the country should be denied all civil rights, and the protection of the Fourteenth and Fifth Amendments. Congress has not so acted. It was content to amke an illegal entry a mere misdemenaor punish--able by imprisonment for a period not to exceed one year, or a fine of not more that $1,000, or both fine and imprisonment (U.S.C. title 8 180 (a) (8U.S.C.A. 180 (a). It is not for the court to add to these penalties by depriving him of his property, in this case the right to recover damages for the injury inflicted by defendant be used to abrogate constitutionally protected rights.

B. The Constitutional Issue Presented By This Case Is of First Instance

Although many of the above-cited cases concern "illegal" aliens such as the appellant Bolaños, in none does the issue presented by this case appear to have been decided, to wit: Can the Immigration and Naturalization Service, under the guise of its discretionary powers,

abbrogate a right guaranteed by the Constitution? Appellant's position is that Congress in its wisdom never meant to grant to the Immigration Service the right to deny to an alien his guaranteed Constitutional rights merely by deporting him. Deportation, after all, is but a mere civil remedy available to the Government, and, as such, may not be used to interfere with those rights firmly guaranteed to the appellant by the Constitution, federal statutes and decisional law.

Appellant further contends that although a stay of deportation is normally, and rightfully, within the discretionary authority of the Immigration Service, where there is a clash between a Constitutionally protected right (as Bolaños has to maintain the civil actions he has pending) and that discretionary power, the latter must, of necessity, fall the result being that, in that situation, the Immigration Service has no discretionary power and must bow to the Constitution and grant the stay of deportation pending the trial and determination of the civil actions.

POINT II

THE NATURE OF THE CASE WAS MISINTERPRETED BELOW

A. Chief Judge Mishler's Decision of November 15, 1974 did not address itself to the Constitutional Issue Clearly Raised

Bolaños, in the pleadings and supporting papers submitted below, (6a, 8a, 9a, 12a, 25a, 27a, 41a, 42a) clearly raised [redacted] the Constitutional issue discussed under Point I.

The decision of Chief Judge Mishler (29a-36a) at no point dealt with that Constitutional issue, instead treating the case soley as one involving the discretionary powers of the Immigration Service (34a-36a).

Interestingly enough, at no point prior to Judge Mishler's decision, was the issue of abuse of discretion even raised by Bolaños; his position consistently being that the Immigration Service simply does not have discretionary authority under such circumstances as herein.

Certainly, it is a canon of judicial construction that if a controv--ersy involving a Constitutional issue can be resolved by reference to a non-Consititutional authority, the latter should be depositive. Perhaps the decision below was meant to dispose of this case accordingly. If so, it should have so stated in clear terms. Instead, it simply ignored the issue. If the Due Process clause of the Fifth Amendment did not exist if section 1981 of the Civil Rights Act did not exist if there were no decisional law guaranteeing the right of aliens to sue, then, perhaps the decision below would have been correct in treating the case solely from the point of view of the abuse of discretion standard. But they do exist, and appellant contends that the district court erred in not dealing with the issue.

B. Even applying the Abuse of Discretion Standard, the Decision Below Was Erroneous, As the Cases Cited are Either Distinguishable or Misinterpreted

If, conceding merely for the sake of this argument, that the Immigration Service actually does have the discretionary authority to stay or not stay Bolaños deportation, appellant contends that on the authority of the very cases cited by the district court, that such discretion was abused.

Turning to the first of those cases (35a) Kladis v. Immigration and Naturalization Service, 343 F. 2d 513 (7th Cir. 1965), a reading of

the case reveals that four extensions of the voluntary departure date were granted after the alien's original voluntary departure date had come and gone so as to allow the alien time to prosecute his Workmen's Compensation case. The court wrote, in finding no abuse of discretion:

> "It is undisputed that petitioner has taken no steps to expedite his hearing before the Industrial Commission or to have his own deposition taken therein. Further, petitioner has completely ignored the several extended departure dates of which he had notice."

In Mr. Bolaños situation, he failed to honor but one voluntary departure date and has since then been completely cooperative with the Immigration Service. Further his deposition upon defendant's request in Bolaños v. Codd, Civil Action No. 1578 is scheduled to be taken in January of 1975, and in no manner is Bolaños being dilatory. Nonetheless the Immigration Service has granted him no extensions to prosecute his civil actions. Mr. Bolaños is here lawfully now only through judicial intervention.

In Fan Wan Keung et al v. Immigration and Naturalization Service, 434 F.2d 301 (2d Cir. 1970) (35a), there is not even an issue of the right of an alien to maintain civil actions. The case merely stands for the proposition that the Immigration Service does not necessarily abuse its discretionary authority when it changes its policy in administering requests for stays of deportation. Appellant has no quarrel with that proposition; however, it is irrelevant to the issue before the court.

In reference to the next cited case (35a,36a) in the decision being appealed from, Adams v. Immigration and Naturalization Service, 349 F. Supp. 313 (N.P. Ill. 1972), the alien therein involved had previously

been deported under another name, then entered into an admittedly fraudulent marriage (if indeed there was a marriage at all as the "spouse" denied under oath that she had ever been married to him), and then requested a stay of deportation to allow him time to pursue a divorce action from his "spouse." Not surprisingly, under the circumstances, the court found no abuse of discretion in the denial of a request for a stay of deportation. The court stated:

> ***Even if it has been the "usual policy", as plaintiff asserts, for the Service to grant extensions of voluntary departure dates for the purpose of concluding pending litigation, that policy can be changed or discretionarily applied so as to avoid dilatory tactics (at315) (emphasis added)

Appellant contends that the Adams court has enunciated the correct standard to be applied to the discretionary power of the Immigration Service regarding stay of deportation where there is pending civil litigation: that where the civil matters are being used for dilatory purposes, then, and only then, does the Immigration Service's, discretionary powers come into play. In all other cases, the Constitution usurps such discretionary authority, and the Constitutionally protected rights of the alien must be allowed to run their course. In the conflict between the Immigration Service and the Constitution, the former must bow to the latter.

POINT III

BOLAÑOS PRESENCE IS ABSOLUTELY NECESSARY FOR THE PROSECUTION OF HIS CIVIL ACTIONS

Bolaños civil actions are based on the false arrest and imprisonment of March 6, 1974 through April 16, 1974. The arrest was due to a case

of mistaken identity. When and if either, or both, cases come to trial it will be of utmost importance for the jury to see for themselves the physical appearance of Bolaños, to compare him with the description of the alleged perpetrator.

However, even before trial, his presence is necessary. Already, in Bolaños v. Codd, Civil Action No. 74C 1578, the defendant has demanded an oral examination before trial which is scheduled for January 14, 1975, and it will, of course, be necessary to go over the transcript with him in order to correct any errors therein.

As the injury allegedly done to Bolaños is very serious, his civil actions entail very large sums in damages and it would be a disservice not only to Bolaños, but also to the defendants who would be deprived of many pre-trial procedures if Bolaños were deported not to mention their right of cross-examination at trial.

Further, in passing two other matters should be noted: First, although Bolaños has a pending application for lawful permanent residency based on his marriage to a lawful permanent resident and also expects to become the father of an American citizen child which could also be the basis for eventual lawful residency, neither happening is guaranteed and in any case it would approximately three (3) years before such visa would issue. By then the civil actions, if not dismissed for failure to prosecute, would be stale, the witnesses memories would be stale, and it would be difficult at that point to locate the necessary witnesses.

Secondly, at oral argument below, Chief Judge Mishler raised the issue that if the court were to direct the Immigration Service to issue

a visa for Bolaños to return for the purposes of trial, would that not be a possibility? The answer to that question, as more fully set forth in the Supplemental Affidavit of Attorney (24a, 25a) is "no". Outside the United States, the sole and exlusive responsibility for the issuance of visas for whatever purpose is in the hands of the United States Consulate which is under the juris - diction of the State Department. Further, the issuance of a visa by an American consulate abroad is within the sole discretion of such consulate and not reviewable in the courts, Act of 1952, 104 (a), 221, 8 U.S.C.A. 1104 a. 1201; United States ex rel. London v. Phelps, 22 F.2D 288 (2d Cir. 1927), cert. denied, 276 U.S. 630 (1928); See brownell v. Tom We Shung 352 U.S. 180, 184n.3 (1956); United States ex rel. Ulrich v. Kellogg 1929, 58 App. D.C. 360 30 F2d 985, certiorari denied United States ex rel. Ulrich v. Stimson, 279 U.S. 868, 49 S. Ct. 482; Licea-Gomez v. Pilliod 193 F. Supp. 577

CONCLUSION

The decision of the court below should be reversed and on injunction - should issue requiring the Immigration and Naturalization Service to stay Bolaños' deportation pending the determination of his pending civil actions.

Respectfully submitted,

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